MAR 26 2001

No. 00-596, 00-597

FILED
MAR 26 2001
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

LORILLARD TOBACCO CO., *et al.*,
Petitioners,

v.

THOMAS F. REILLY,
ATTORNEY GENERAL OF MASSACHUSETTS,
Respondent.

ALTADIS U.S.A. INC., *et al.*,
Petitioners,

v.

THOMAS F. REILLY,
ATTORNEY GENERAL OF MASSACHUSETTS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR THE CITIES OF OAKLAND, CALIFORNIA, AND CHICAGO, ILLINOIS, AS *AMICI CURIAE* SUPPORTING RESPONDENT

JOHN A. RUSSO,
City Attorney
BARBARA J. PARKER
MARK P. WALD
One Frank H. Ogawa Plaza,
Oakland, CA 94612

MARA S. GEORGES,
Corporation Counsel
LAWRENCE ROSENTHAL
BENNA RUTH SOLOMON
City Hall, Room 600
Chicago, IL 60602

STEPHEN P. BERZON *
MICHAEL E. WALL
ALTSHULER, BERZON, ET AL.
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151

ROBERT C. POST
School of Law (Boalt Hall)
University of California
Berkeley, CA 94720

* *Counsel of Record*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
INTEREST OF THE CITIES OF OAKLAND AND CHICAGO	1
SUMMARY OF ARGUMENT	2
ARGUMENT	6
I. The First Amendment Permits the Government to Prohibit Commercial Advertisements of a Product to Persons for Whom that Product Is Illegal, So Long as the Regulation Has a Reasonable Fit to Preventing Illegal Transactions	6
A. The First Amendment Does Not Protect Commercial Speech that Advertises or Promotes Illegal Activity	7
B. A Regulation of Commercial Speech Has a "Reasonable Fit" to the Prevention of Illegal Transactions If It Addresses a Serious Problem of Illegal Sales to Minors and Leaves Open Sufficient Channels By Which Adult Consumers Can Learn About the Product	9
C. Restrictions on Commercial Speech Targeted to Advertising that Promotes an Illegal Transaction Need Not Be Content Neutral	16
II. Massachusetts' Regulations Have a Reasonable Fit to the Compelling Goal of Preventing a Serious Problem of Illegal Underage Tobacco Sales and Use	19
CONCLUSION	30

TABLE OF AUTHORITIES

CASES Page

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) ..... *passim*
Bigelow v. Virginia, 421 U.S. 809 (1975) 7, 8
Board of Trustees v. Fox, 492 U.S. 469 (1989) ..... *passim*
Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983) ..... *passim*
Butler v. Michigan, 352 U.S. 380 (1957) 5, 13, 22
Carey v. Population Services International, 431 U.S. 678 (1977) 5
Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980) ..... *passim*
City of Erie v. Pap's A.M., 529 U.S. 277 (2000) ... 20
City of Ladue v. Gilleo, 512 U.S. 43 (1994) 23
City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) 20, 25
Cohen v. California, 403 U.S. 15 (1971) 24
Columbia Broadcasting System v. Democratic National Comm., 412 U.S. 94 (1973) 26
Consolidated Cigar Corp. v. Reilly, 218 F.3d 30 (1st Cir. 2000) 8
Denver Area Educational Telecommunications Consortium v. Federal Communications Commission, 518 U.S. 727 (1996) 21
Edenfield v. Fane, 507 U.S. 761 (1993) 8, 14, 29
Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) 5
Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726 (1978) ..... *passim*
Florida Bar v. Went for It, Inc., 515 U.S. 618 (1995) ..... *passim*
Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) 29
Ginsberg v. New York, 390 U.S. 629 (1968) 12, 21

TABLE OF AUTHORITIES—Continued

CASES

	Page
Greater New Orleans Broadcasting Association v. United States, 527 U.S. 173 (1999)	*passim*
Hill v. Colorado, 530 U.S. 703 (2000)	23, 25
In re Primus, 436 U.S. 412 (1978)	9
In re R.M.J., 455 U.S. 191 (1982)	9, 14
Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952)	13
Kovacs v. Cooper, 336 U.S. 77 (1949)	16
Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977)	16, 23
Lorillard Tobacco Co. v. Reilly, 84 F. Supp. 2d 180 (D. Mass. 2000)	8
Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981)	*passim*
New York v. Ferber, 458 U.S. 747 (1982)	14
Nixon v. Shrink Missouri Government PAC, 528 U.S. 377 (2000)	20
Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978)	*passim*
Packer Corp. v. Utah, 285 U.S. 105 (1932)	19
Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973)	2, 6, 7, 17
Reno v. American Civil Liberties Union, 521 U.S. 844 (1997)	13, 14, 19
Rubin v. Coors, 514 U.S. 476 (1995)	10
Sable Communications v. Federal Communications Commission, 492 U.S. 115 (1989)	12, 13, 20, 21
Turner Broadcasting System v. Federal Communications Commission, 520 U.S. 180 (1997)	26
United States v. Edge Broadcasting, 509 U.S. 418 (1993)	3, 11

TABLE OF AUTHORITIES—Continued

Page

United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000) 14, 20
Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) ..... *passim*
Ward v. Rock Against Racism, 491 U.S. 781 (1989) 11
Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) 9, 17, 26

STATUTES AND REGULATIONS

21 U.S.C. §§ 812(c), 823(e) 18
Mass. Gen. L., ch. 270, § 6 2
61 Fed. Reg. 44504 (Aug. 28, 1996) 24

OTHER AUTHORITIES

Levy, *RJR Memo Targeted Teen Market*, USA Today, at ID (Oct. 6, 1995) 27
Tribe, *American Constitutional Law* § 12-15 (2d ed. 1988) 7
Perry, C., *The Tobacco Industry and Underage Youth Smoking: Tobacco Industry Documents from the Minnesota Litigation*, 153 Archives Pediatric Med. 935, 936, 938 (Sept. 1999) 27

IN THE

Supreme Court of the United States

LORILLARD TOBACCO CO., *et al.*,
Petitioners,

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF MASSACHUSETTS,
Respondent.

ALTADIS U.S.A. INC., *et al.*,
Petitioners,

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF MASSACHUSETTS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

BRIEF FOR THE CITIES OF OAKLAND, CALIFORNIA, AND CHICAGO, ILLINOIS, AS *AMICI CURIAE* SUPPORTING RESPONDENT

INTEREST OF THE CITIES OF OAKLAND AND CHICAGO [1]

The City of Oakland, California ("Oakland"), is defendant in *Eller Media Co. v. City of Oakland*, No. CV-98-02237 WHA (N.D. Cal.), *appeals pending*, Nos. 01-15210, 01-

---

[1] The Cities of Oakland and Chicago submit this brief, through their authorized law officers, pursuant to Rule 37.4.

15354 (9th Cir.), a billboard industry challenge to Oakland's ordinance that restricts outdoor alcohol and tobacco sign advertising near where minors live, go to school, and play. The *Eller Media* plaintiffs challenged the Oakland ordinance's application to alcohol, but not tobacco, advertising. After thirty months of litigation, the district court granted summary judgment for Oakland on December 7, 2000. (The opinion is attached in an appendix bound with this brief, cited as "_a.") The plaintiffs' motions for relief from judgment and appeals to the Ninth Circuit are pending.

The City of Chicago, Illinois ("Chicago"), is defendant in *Federation of Advertising Industry Representatives, Inc. v. City of Chicago*, 189 F.3d 633 (7th Cir. 1999), *cert. denied*, 529 U.S. 1066 (2000), a billboard industry challenge to Chicago's ordinance that restricts outdoor alcohol and tobacco sign advertising near where minors live, go to school, and play. The Seventh Circuit reversed the district court's ruling that the ordinance was preempted by federal law, and the parties are now preparing for trial on the plaintiffs' First Amendment claims.

SUMMARY OF ARGUMENT

If there is one principle of commercial speech that this Court has unanimously and repeatedly reaffirmed, it is that the First Amendment provides no protection for commercial speech that advertises an illegal product. *See, e.g., Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173, 183 (1999); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973). It is a crime in Massachusetts to sell or give tobacco to minors. *See* Mass. Gen. L., ch. 270, § 6. Accordingly, Massachusetts' regulation of advertisements that induce minors to participate in illegal tobacco transactions would warrant no First Amendment scrutiny whatsoever, but for the fact that the regulations also have an incidental effect on tobacco advertising to adults.

While *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), does not explicitly address the context of restrictions on commercial speech for products that are illegal for some purchasers but not for others, this case can be decided based on established and uncontroversial principles, without resolving the *Central Hudson* test's continuing vitality. Massachusetts' regulations reasonably target a serious and widespread problem of illegal youth tobacco sales, without depriving adults of sufficient opportunities to learn about tobacco products. Any incidental burden these regulations might impose on tobacco advertising to adults is proportional to the state's compelling goal of preventing illegal tobacco sales to children, who are too young to make mature decisions about whether to use that dangerous and addictive product. Massachusetts' regulations thus have a "reasonable fit" to the state's compelling goal of preventing illegal tobacco sales to minors, *see Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989), and are, for this reason, constitutional.

The government's power to restrict commercial speech that promotes unlawful activity does not simply disappear whenever such restrictions incidentally affect commercial speech directed toward lawful consumers. This Court has long held that the First Amendment permits "prophylactic" regulation of commercial speech in "circumstances likely to pose dangers that the State has a right to prevent," *see, e.g., Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 449, 464 (1978). One of the most serious of these dangers is the solicitation of crime, and the government's prophylactic power should be at its peak when it is exercised to prevent illegal behavior. The government is not rendered impotent to restrict commercial speech that promotes crime simply because such restrictions might have an impact on advertisements to lawful consumers. *Cf. United States v. Edge Broadcasting*, 509 U.S. 418, 434-35 (1993).

This is not to say that a state could constitutionally prohibit advertising for every product that is illegal to minors, simply because it is illegal to minors, without regard to the burden on adults. The government may neither leave lawful consumers in the dark, nor regulate advertising addressed to illegal users as a pretext for the suppression of commercial speech directed at those to whom the product may lawfully be sold. But no infringement of First Amendment values results where a regulation of commercial speech is justified by the need to prevent the illegal sale to minors of a dangerous, addictive product that has a history of being tacitly marketed to youth, so long as the regulation leaves adults sufficient means to learn about the product. The government's interests here are far stronger than those which justified restrictions on the broadcast of the seven "filthy words." *Federal Communications Comm'n v. Pacifica Found.*, 438 U.S. 726, 748-51 (1978).

By prohibiting tobacco ads in geographical areas where minors spend most of their time, in a medium particularly accessible to children, Massachusetts has targeted advertisements that encourage youth to buy tobacco. There is no better way—petitioners certainly have suggested none—to target and regulate such ads. Massachusetts' tobacco advertising regulations leave open to tobacco advertisers numerous, traditionally-significant media, some of which are not particularly expensive, including newspapers, magazines, handbills, the mail, and, of course, any sign more than three blocks from a school or playground. The regulations also permit tobacco companies to voice their views on any issue—whether it be the tobacco tax or the health effects of smoking—as often as they like, so long as they do not do so through commercial speech. In short, Massachusetts' regulations neither "impede debate over central issues of public policy," *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996) (Stevens, J.), nor "reduce the adult population . . . to reading only what is fit for

children," *Butler v. Michigan*, 352 U.S. 380, 383 (1957). They simply make it more difficult for tobacco companies to hawk their wares where children go to school and play and through a medium that evades parental control.

Once it is recognized that the sale of tobacco to minors is a crime, and that tobacco signs near schools and playgrounds directly relate to that crime, the fallacies in petitioners' call for strict scrutiny become plain. While Massachusetts' regulations are indisputably content based, so too are all regulations of commercial speech, including those aimed at false and misleading advertising. Massachusetts' regulations are justified by the state's unquestionable power to "freely regulate commercial speech that concerns unlawful activity," *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 623-24 (1995), an unprotected content-based subcategory of commercial speech, as well as the state's "well settled" power to "adopt more stringent controls on communicative materials available to youths than on those available to adults," *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975). As Justice Stevens has written, "[a] picture which may appropriately be included in an instruction book may be excluded from a billboard." *Carey v. Population Servs. Int'l*, 431 U.S. 678, 717 (1977) (Stevens, J., concurring).

Massachusetts has enacted a reasonably targeted advertising regulation to prevent implicit invitations to minors to participate in a crime, and that regulation does not deprive lawful adult consumers of sufficient means of learning about tobacco products. Under established principles of First Amendment jurisprudence, this is sufficient to sustain the constitutionality of the regulation.

ARGUMENT

I. The First Amendment Permits the Government to Prohibit Commercial Advertisements of a Product to Persons for Whom that Product Is Illegal, So Long as the Regulation Has a Reasonable Fit to Preventing Illegal Transactions.

The First Amendment would plainly permit the state to prohibit a commercial billboard facing a middle school that carries the message: "*Hey kids*, buy Camel to be cool and sexy." *See, e.g., Pittsburgh Press*, 413 U.S. at 388. The question presented in this case is whether the state is disabled from regulating such signs if the italicized words, "*Hey kids*," are not made explicit.

Although *Central Hudson* does not explicitly address the situation where a product such as tobacco or alcohol is illegal for some purchasers, but not for others, this case can be decided based on established and uncontroversial principles, without resolving the continuing vitality of the *Central Hudson* test. This Court extended a limited form of First Amendment protection to commercial speech principally to protect lawful consumers' interest in commercial information. This interest does not apply where advertising is addressed to illegal purchasers, particularly when these purchasers are children. When a commercial speech restriction has a "reasonable fit" to preventing a serious problem of illegal sales to minors—by targeting commercial speech most likely to influence children to make an illegal purchase, without leaving lawful adults in the dark about their commercial options—it is constitutional.[2]

---

[2] Although we argue in this brief that commercial speech regulations designed to prevent illegal sales to minors are constitutional if they have a "reasonable fit" to that goal, we wish to make clear that *amici* agree with the position of *amici* City of Los Angeles, *et al.*, that Massachusetts' regulations also satisfy each element of the Central Hudson inquiry and are not preempted.

A. The First Amendment Does Not Protect Commercial Speech that Advertises or Promotes Illegal Activity.

Commercial speech "occurs in an area traditionally subject to governmental regulation," and as this Court has said, "the state does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." *Ohralik*, 436 U.S. at 456. Nevertheless, in a series of cases beginning with *Bigelow v. Virginia*, 421 U.S. 809 (1975), this Court extended to commercial speech a "limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values." *Ohralik*, 436 U.S. at 456. The Court took that step largely to protect "consumer's interest in the free flow of commercial information." *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 763 (1976). Thus, "'[t]he entire commercial speech doctrine . . . represents an accommodation between the right to speak and hear expression *about* goods and services and the right of the government to regulate the sales *of* such goods and services.' " *44 Liquormart*, 517 U.S. at 499 (plurality) (quoting Tribe, *American Constitutional Law* § 12-15, at 903 (2d ed. 1988)).

Certain types of advertising, including that "related to illegal behavior," have received no constitutional protection at all. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 69 (1983); *Central Hudson*, 447 U.S. at 563-64. Ever since the Court first directly confronted the question, *see Pittsburgh Press*, 413 U.S. at 388, it has repeatedly and without hesitation reaffirmed that the government "may freely regulate commercial speech that concerns unlawful activity." *Florida Bar*, 515 U.S. at 623-24; *accord Greater New Orleans*, 527 U.S. at 183; *Virginia Board*, 425 U.S. at 772. Even those members of the Court who have sometimes raised doubts about the broadest applications of the commercial

speech doctrine have agreed on this point. *See 44 Liquormart*, 517 U.S. at 497 n.7 (opinion of Stevens, J.); *id.* at 520, 518 (Thomas, J., concurring); *Fox*, 492 U.S. at 475 (majority opinion of Scalia, J.).

Where commercial speech promotes illegal activity, the government's "interest in regulating the underlying transaction," *Edenfield*, 507 U.S. at 767, is at its height. Moreover, none of the usual reasons for protecting commercial speech apply to solicitations to unlawful purchasers. A consumer has no cognizable competing interest "in the free flow of commercial information" about "who is charging what," *Virginia Board*, 425 U.S. at 763, 764, when the consumer may not lawfully buy the product. *See Central Hudson*, 447 U.S. at 563. Nor is there a "public interest" that purchases of illegal goods, "in the aggregate, be intelligent and well informed." *Virginia Board*, 425 U.S. at 765. Bans on advertising related to illegal activity do not endanger deeper, democratic values by "obscur[ing] an 'underlying governmental policy,' " *44 Liquormart*, 517 U.S. at 503, for the government's policy is plain on the face of the criminal code. And whatever incremental contribution to public debate may be made by *commercial* speech for such products as marijuana or "cop killer" bullets, it is more than outweighed by the government's compelling interest in preventing a flourishing, unlawful trade in prohibited goods.[3]

---

[3] The Attorney General has, throughout this litigation, argued that tobacco sales to minors are illegal. *See Lorillard Tobacco Co. v. Reilly*, 84 F. Supp. 2d 180, 186 (D. Mass. 2000); *Consolidated Cigar Corp. v. Reilly*, 218 F.3d 30, 43, 51 (1st Cir. 2000). While that illegality may not end the inquiry under *Central Hudson*'s first prong, the Attorney General has always contended that it informs the constitutional analysis.

B. A Regulation of Commercial Speech Has a "Reasonable Fit" to the Prevention of Illegal Transactions If It Addresses a Serious Problem of Illegal Sales to Minors and Leaves Open Sufficient Channels By Which Adult Consumers Can Learn About the Product

Petitioners and their *amici* cursorily dismiss the fact that the sale of tobacco to minors is a crime on the ground that the sale of tobacco to adults is not. The mere fact that a product is lawful for some users, however, cannot deprive the government of all power to restrict marketing to illegal purchasers. Instead, what is called for is "a constitutionally appropriate balance," *see Bolger*, 463 U.S. at 84 (Stevens, J., concurring) (internal quote marks omitted), a balance that both acknowledges the government's compelling need to prevent crime and that simultaneously protects lawful purchasers' interests in information about goods and services.

1. It has always been understood that a regulation of commercial speech may be overbroad to a degree that would be intolerable if applied to noncommercial expression. *Compare Ohralik*, 436 U.S. at 467-68, *with In re Primus*, 436 U.S. 412, 421-22, 428-32 (1978). Thus, in "circumstances likely to pose dangers that the State has a right to prevent," the government may establish and enforce "prophylactic" regulations of commercial speech "whose objective is the prevention of harm before it occurs." *Ohralik*, 436 U.S. at 449, 464; *see also In re R.M.J.*, 455 U.S. 191, 203 (1982). The government may ban in-person attorney solicitations to prevent overreaching, even absent evidence that every instance of in-person solicitation in fact overreaches. *See Ohralik*, 436 U.S. at 466, 468. The government may require attorneys who take a case on contingency to disclose clients' liability for costs, even though not all clients would be misled without the disclosure. *Zauderer v. Office of Disciplinary*

Counsel, 471 U.S. 626 (1985). The government may prohibit all on-campus commercial sales pitches to "prevent[] commercial exploitation of students," *Fox*, 492 U.S. at 475, even though not all on-campus sales will inflict such harms. And the government may ban off-site commercial billboard advertisements as traffic hazards, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 508 (1981), even though some such ads might pose no such hazard.

Thus, so long as the overbreadth of a regulation of commercial speech is "in proportion to the interests served," this Court has "le[ft] it to governmental decisionmakers to judge what manner of regulation may best be employed." *Fox*, 492 U.S. at 480 (internal quote marks omitted). The Court has not required that the regulation of commercial speech be the least restrictive possible; instead, it has upheld such regulation when it evidences a "reasonable fit" between "the legislature's ends and the means chosen to accomplish those ends." *Id; accord, Greater New Orleans*, 527 U.S. at 188; 44 *Liquormart*, 517 U.S. at 507-08 (plurality); *id.* at 529 (O'Connor, J., concurring); *Florida Bar*, 515 U.S. at 632; *Rubin v. Coors*, 514 U.S. 476, 486 (1995).

The permissible scope of such prophylactic regulation is necessarily at its broadest when the government acts to restrict commercial speech "related to illegal behavior," *see Bolger*, 463 U.S. at 69, for in such circumstances the underlying harm the state seeks to prevent is most grave. The danger is that an act deemed serious enough to warrant criminal sanction may result. Thus, as a general rule, "the government may freely regulate commercial speech that concerns unlawful activity." *Florida Bar*, 515 U.S. at 623-24.

Where commercial speech relates to activity that is only *sometimes* unlawful—where, for example, advertisements can reach both lawful and unlawful purchasers—it will frequently prove impossible, in practice, to distinguish with precision

which ads do and do not induce illegal sales. Yet it is precisely because of such uncertainties that commercial speech doctrine has always permitted the government to enact prophylactic restrictions where the commercial speech is "likely" to pose dangers that justify its restriction. *Ohralik*, 436 U.S. at 449. It is not only appropriate in such circumstances, but essential, for the government to make what the Court has termed a "rough approximation of efficacy," *see Greater New Orleans*, 527 U.S. at 194-95, by regulating the location, hours, or style of advertisements to restrict only those instances most likely to induce illegal sales. The government should be able to proscribe an advertisement for nerve gas in *Soldier of Fortune* magazine, for example, even if the mailing of such an offer to a military procurement officer is allowed. And the government may prohibit lottery advertisements from being broadcast from jurisdictions where the lottery is illegal, even though it thereby burdens listeners who live where the lottery is legal. *See Edge Broadcasting*, 509 U.S. at 423. While the government may not "burden substantially more speech than is necessary to further [its] legitimate interests," *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989), "[s]o long as the chosen means are not substantially broader than necessary to achieve the government's interest, . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* at 800; *cf. Fox*, 492 U.S. at 478 (holding that the time, place and manner doctrine sets a ceiling for First Amendment scrutiny of commercial speech regulation).

This is the only approach that will neither cut off the flow of commercial information to lawful purchasers nor invite advertisers implicitly to solicit criminal transactions by placing ads where they are most likely to induce illegal sales. *Fox*'s "reasonable fit" test is a manifestly appropriate measure of the government's authority to steer a middle

course between these extremes. Whatever concerns may exist about this Court's commercial speech doctrine as applied to "truthful information about *entirely lawful* activity," *Virginia Board*, 425 U.S. at 773 (emphasis added), the government must be permitted adequate leeway to prevent illegal transactions, and to prevent commercial speech that induces them.

2. Where the government acts to prevent transactions that are not only illegal, but also involve minors in that illegality, its prophylactic power over commercial speech is necessarily at its peak. The government's interest in preventing harm to minors is compelling, *see, e.g.*, *Sable Communications v. Federal Communications Comm'n*, 492 U.S. 115, 126 (1989), for minors are unusually vulnerable and unusually susceptible to marketers' influence. As Justice Stewart wrote in his concurrence in *Ginsberg v. New York*, 390 U.S. 629, 649-50 (1968):

> The First Amendment guarantees liberty of human expression in order to preserve in our Nation what Mr. Justice Holmes called a "free trade in ideas." . . . The Constitution guarantees, in short, a society of free choice. Such a society presupposes the capacity of its members to choose.
>
> When expression occurs in a setting where the capacity to make a choice is absent, government regulation of that expression may co-exist with and even implement First Amendment guarantees. . . . ¶ I think a State may permissibly determine that, at least in some precisely delineated areas, a child . . . is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees.

Thus, where advertising for a product illegal to minors is restricted only in places where minors spend most of their

time, those restrictions are firmly supported by "society's right to 'adopt more stringent controls on communicative materials available to youths than on those available to adults.' " *Pacifica*, 438 U.S. at 757 (Powell, J. concurring).

This Court has not, contrary to the claim of *amicus* Association of National Advertisers ("ANA"), consistently rejected society's right to protect children from speech that is particularly dangerous for them. *Compare* ANA Br. at 9. Not one of the cases cited by the ANA stands for such a proposition. Most involved restrictions on *non*commercial speech, and none involved limitations as narrow as those challenged here.[4] Only in *Bolger* did the Court confront a restriction on commercial speech, and the law held unconstitutional there "purg[ed] all mailboxes" of any advertisements for contraceptives, a product that was not only entirely legal for minors, but constitutionally protected. 463 U.S. at 73-75.

These cases hardly hold that the government may never regulate advertising to minors in a way that imposes incidental burdens on adults, and several of these cases suggest precisely the opposite. *See, e.g.*, *Sable*, 492 U.S. at 126 (government may enact narrowly drawn regulation on *non*commercial speech to protect "the physical and psychological well-being of minors"); *Joseph Burstyn*, 343

---

[4] *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 498 (1952), for example, invalidated a law that banned any film the state viewed as "sacrilegious." *Butler* struck down a law that banned all books, magazines, newspapers, writings, ballads, pictures, drawings, pamphlets, publications, recordings, photographs, and "other thing[s]" considered by the state as "tending to the corruption of the morals of youth." 352 U.S. at 381. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 869, 879 (1997), rejected a ban on transmission of any indecent communications over the Internet, in part because substantially less restrictive alternatives were available. And *Sable*, 492 U.S. at 128, 130-31, invalidated a ban on all indecent "dial-a-porn," again because less-restrictive alternatives were available.

U.S. at 502 (a movie's "capacity for evil, particularly among youth" may be "relevant in determining the permissible scope of community control"); *Reno*, 521 U.S. at 875 ("the governmental interest in protecting children from harmful materials" cannot justify "an *unnecessarily broad* suppression" of *non* commercial speech to adults (emphasis added)). Indeed, when the Court has felt the well-being of children to be unambiguously at stake, as with child pornography, it has not hesitated to approve regulations of speech that had quite wide-ranging impact on communications available to adults. *See, e.g., New York v. Ferber*, 458 U.S. 747 (1982).

3. If regulations of commercial speech for a product that is illegal to some but not to others evince a "reasonable fit" to preventing illegal transactions, there is little danger to legitimate commercial speech. There can be no "reasonable fit" unless the danger of illegal transactions is in fact real; for in the absence of a real problem, the burden on speech to lawful consumers could not be justified. *See Fox*, 492 U.S. at 480 (burden on commercial speech must be "'in proportion to the interest served'" (quoting *In re R.M.J.*, 455 U.S. at 203)). The "reasonable fit" inquiry therefore does not permit the government to use an illusory danger of illegality as a pretext for pursuing "'an underlying governmental policy' that could be implemented without regulating speech." *44 Liquormart*, 517 U.S. at 501 (Stevens, J.). The question in each case is whether an "actual problem" exists. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, __, 120 S. Ct. 1878, 1891 (2000). This Court has adequate doctrinal tools to make such determinations. *Compare Ohralik*, 436 U.S. at 464-68 (in-person solicitation by attorney sufficiently dangerous to support regulation) *with Edenfield*, 507 U.S. at 774-75 (in-person solicitation by accountant not demonstrated to be a real problem).

If the underlying unlawful problem is not only "actual," but epidemic, the legislature's determination to restrict commercial solicitations to illegal users should be given corresponding weight. This Court has been prepared to accept quite drastic restrictions on commercial advertising where the underlying governmental purpose was sufficiently important. In *Metromedia*, 453 U.S. at 508, for example, the Court upheld a total ban on all off-site commercial billboards based on the city's interests in preventing traffic hazards and unsightly obtrusions. The government's interest in preventing *illegal* sales to *minors* of harmful and addictive products such as tobacco and alcohol is of far greater magnitude. That interest, when backed by substantial evidence of widespread illegal sales and associated societal ills, justifies a commensurate burden on commercial advertising to adults.

4. This Court has long reviewed with "special care" restrictions that "entirely suppress commercial speech in order to pursue a nonspeech-related policy." *Central Hudson*, 447 U.S. at 566 n.9. As Justice Stevens has noted, "complete speech bans . . . all but foreclose alternative means of disseminating certain information." 517 U.S. at 501 (Stevens, J.). Such complete bans can deny lawful consumers important information about goods and services necessary to informed economic decision making.

Restrictions on commercial speech that allow ample alternative channels of communication do not raise these concerns. There are in fact a vast array of methods by which marketers can promote their commercial messages. Advertisers can reach lawful consumers without bombarding them through all media, in all places, at all times. Commercial sign advertising represents only one of numerous avenues of communication, so much so that this Court has countenanced a complete ban on off-site commercial billboards. *See Metromedia*, 453 U.S. at 508-12. In evaluating the constitutionality of restrictions on commercial speech, this Court has frequently taken into account the

sufficiency of remaining channels of communication when evaluating the reasonableness of the government's restriction. *Compare Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85, 93-94 (1977) (noting the unique role played by residential "for sale" signs in the real estate market, in which "reality is not marketed through leaflets, sound trucks, demonstrations, or the like. . . .") *with Florida Bar*, 515 U.S. at 633-34 (personal injury victims have adequate means to learn about lawyers even if lawyers are not permitted to solicit them by mail in the immediate aftermath of their accidents). It is clear that burdens on commercial speech can be constitutional if lawful consumers retain adequate access to information about the relevant product or service, *see, e.g.*, *Ohralik*, 436 U.S. at 458, for in such circumstances, the First Amendment's interest in the "free flow of commercial information" is vindicated, *Virginia Board*, 425 U.S. at 763.

Where the burden on commercial speech to lawful consumers is an incident to restrictions on commercial advertising that encourages illegal transactions, the strength of the government's justification supports a degree of restriction that might not be permitted in other circumstances. Certainly if sound trucks are not an essential medium for political expression because "[t]here is no restriction upon the communication of ideas or discussion of issues by the human voice, by newspapers, by pamphlets, by dodgers," *Kovacs v. Cooper*, 336 U.S. 77, 89 (1949), then the same must be true where the government carefully targets restrictions only on one form of commercial promotion for a product that is illegal for a sizeable proportion of the audience, and only in locations especially likely to induce unlawful sales.

C. Restrictions on Commercial Speech Targeted to Advertising that Promotes Illegal Transactions Need Not Be Content Neutral.

While it might be said that a regulation of commercial speech to unlawful purchasers is content based, the same

could be said of all regulations of commercial speech. The entire category of commercial speech consists largely of speech that, in one way or another, "propose[s] a commercial transaction." *Virginia Board*, 425 U.S. at 762. Moreover, most commercial speech regulations—including those which prohibit false and misleading advertising—make further content-based distinctions within that category. Yet this has never been thought to require commercial speech regulations to survive strict scrutiny.

From the time this Court first extended limited First Amendment protection to commercial speech, it understood that it was creating a content-based doctrine. *See, e.g.*, *Virginia Board*, 425 U.S. at 761 ("If there is a kind of commercial speech that lacks all First Amendment protection, therefore, it must be distinguished by its content."); *Bolger*, 463 U.S. at 65 ("By contrast, regulation of commercial speech based on content is less problematic."). The Court has repeatedly upheld facially content-based restrictions of commercial speech without applying strict scrutiny, including a prohibition on employment ads listed under gender-specific headings, *see Pittsburgh Press*, 413 U.S. at 388-89; restrictions on unsolicited mailings by lawyers to personal injury victims in the immediate aftermath of an accident, *see Florida Bar*, 515 U.S. at 634-35; contingency-fee disclosure requirements, *see Zauderer*, 471 U.S. at 652-53; and a prohibition on off-site commercial billboard advertising, *see Metromedia*, 453 U.S. at 508-12.

To say that content-based distinctions may play no role in the government's regulation of commercial speech would be to say that the most common forms of restrictions on commercial speech would be required to survive the strictest test this Court applies. That is, as this Court has recognized, a very slippery path. "[R]equir[ing] a parity of constitutional protection" between advertisements that promote an illegal transaction and noncommercial speech, including political, scientific, and artistic expression, would surely bring us

closer to "dilution, simply by a leveling process, of the force of the [First] Amendment's guarantee with respect to the latter kind of speech." *Ohralik*, 436 U.S. at 456; *accord Florida Bar*, 515 U.S. at 623; *Fox*, 492 U.S. at 481 (1989); *Central Hudson*, 447 U.S. at 562 n.5. It is in part for this reason that it would be "incompatible" with the "'subordinate position [of commercial speech] in the scale of First Amendment values' to apply a more rigid standard" to regulations of such speech than to content-neutral restrictions on the time, place and manner of noncommercial speech. *Fox*, 492 U.S. at 478 (alteration in original). Whatever else might be said of the Court's commercial speech doctrine, this insight is certainly apt where the government seeks to restrict commercial advertising that induces a serious problem of illegal sales to minors.

Even petitioners and their *amici* do not advocate strict scrutiny for all content-based restrictions on commercial speech. They accept that *certain* content—commercial speech that is misleading, for example—must be regulable. *See, e.g.*, Pet. Br. 30, No. 00-596. But if commercial speech of misleading content does not warrant strict scrutiny, then commercial speech that promotes criminal transactions involving children certainly does not either.

The government should not be thought to commit impermissible content or viewpoint discrimination if it prohibits billboards advertising anabolic steroids one block from the high school gym. True, there may be *some* legal uses for even Schedule III drugs. *Cf.* 21 U.S.C. §§ 812(c), 823(e). But where the government regulates the location or medium of commercial speech in a reasonably targeted effort to preclude those ads that are most likely to induce sales to unlawful purchasers, the government's purpose and method are fully consonant with First Amendment values.

II. Massachusetts' Regulations Have A Reasonable Fit to the Compelling Goal of Preventing a Serious Problem of Illegal Underage Tobacco Sales and Use.

Massachusetts' tobacco advertising regulations reasonably target an epidemic of illegal underage tobacco sales and use that could not be combated as effectively if tobacco ads near schools and playgrounds were permitted without any restraint. This is not a case in which adults have been left in the dark about tobacco products. Because the incidental burden imposed on tobacco advertising to adults is entirely reasonable in light of the state's compelling purpose, the state's regulations are constitutional.

1. Massachusetts' regulations principally target a medium—advertising signs near schools and playgrounds—that is even more intrusive to children than radio or television broadcasts. Such signs stare implacably at children, and parents cannot turn the signs off. As Justice Brandeis stated almost seventy years ago in upholding Utah's tobacco sign advertising restriction:

> Billboards, street car signs, and placards and such are in a class by themselves. . . . Advertisements of this sort are constantly before the eyes of observers on the streets and in street cars to be seen without the exercise of choice or volition. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. The young people as well as the adults have the message of the billboard thrust upon them by all the arts and devices that skill can produce. In the case of newspapers and magazines, there must be some seeking by the one who is to see and read the advertisements. The radio can be turned off, but not so the billboard or streetcar placard.

Packer Corp. v. Utah, 285 U.S. 105, 110 (1932); *compare Reno*, 521 U.S. at 869 (because Internet speech generally only

reaches persons who take steps to find it, it is less invasive than speech that reaches persons uninvited).

Justice Brandeis' observations of seven decades ago have stood the tests of time and technology. To this day, there remains no mechanism selectively to block or scramble children's view of outdoor signs. *Compare Playboy Entertainment Group*, 120 S. Ct. at 1887. Access cannot be restricted to those with a credit card or some other indicia of majority. *Compare Sable*, 492 U.S. at 128. Children cannot be separated from tobacco signs' solicitation through more vigorous parental "exercise [of] control over information that flows into their mailboxes." *Bolger*, 463 U.S. at 73.

Indeed, the sign advertising industry trumpets the medium's resistance to control. As the district court noted in *Eller Media v. City of Oakland*, "Outdoor advertising 'is seen all day, every day,' in Plaintiffs' words. 'It cannot be turned off like television, tuned out like radio or discarded like newspapers and magazines.'" *See infra*, at 14a (citations omitted); *see also id.* (quoting *amicus* Infinity Outdoor's statement that "[W]e are proud to say, yes, that billboards cannot be turned off, cannot be avoided . . . . Cannot be discarded like you can throw away a newspaper.").[5] Industry and other research the *Eller Media* court found persuasive reveals that:

> Minors pay especially close attention to billboards. Studies show that children's awareness of billboards is,

---

[5] In a case like this, the Court may look to evidence developed by other jurisdictions, including that filed in *Eller Media* by the City of Oakland, in efforts to address similar problems. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 394 (2000). It has never been necessary for one governmental body to duplicate research performed as to other, similarly situated jurisdictions. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 296-99 (2000).

> in the words of a billboard company analysis, "remarkable." "When compared to older viewers, the kids outscored adults in perception, remembrance and correct identification of outdoor advertised messages seen."

See id. (citations omitted). One of these studies found, for example, that boys and girls in San Jose, California, are about 200 percent more likely correctly to identify billboards for Olympia beer than are adults. Expert testimony in *Eller Media* also documented that alcohol advertising begins to influence children who are as young as age six. Children of such tender years are certainly "not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." *Pacifica*, 438 U.S. at 757 (Powell, J., concurring) (quoting *Ginsberg*, 390 U.S. at 649-50 (Stewart, J., concurring)).

In short, children are particularly affected by sign advertising, and that impact is particularly insidious because it evades parental control. Such advertising not only interferes with the government's power to prevent solicitations of a criminal transaction, but also with parents' right "to direct the rearing of their children." *Ginsberg*, 390 U.S. at 639. Thus, the interests Massachusetts' regulations protect are not just substantial, but compelling. *Cf. Denver Area Educ. Telecomm. Consortium v. Federal Communications Comm'n*, 518 U.S. 727, 747 (1996) (plurality opinion) (protecting children from indecency is compelling interest); *id.* at 806 (Kennedy, J., concurring) (same); *id.* at 832 (Thomas, J., concurring) (same); *Sable*, 492 U.S. at 126 ("[T]here is a compelling interest in protecting the physical and psychological well-being of minors.").[6]

---

[6] Oakland for example, unlike Massachusetts, chose not to regulate on-site and in-store advertising, in an accommodation to the particular interest of lawful consumers in learning where alcohol products are

2. While the government certainly may not reduce public discourse "to that which would be suitable for a sandbox," *Bolger*, 463 U.S. at 74, Massachusetts has hardly swept all adult tobacco speech into the sand. *Compare Butler*, 352 U.S. at 381 (striking down a ban applicable to "any book, magazine, newspaper, writing, pamphlet, ballad, printed paper, print, picture, drawing, photograph, publication, or other thing, including any recordings") *with Pacifica*, 438 U.S. at 750 n.28 ("Adults who feel the need may purchase tapes and records or go to the theaters and nightclubs to hear these words."). The state has only restricted tobacco advertising where children are most likely to see it, within three city blocks of schools and playgrounds, leaving tobacco companies numerous alternative means by which to employ their considerable marketing expertise to convey their commercial message to adults.

These alternatives include local, regional, and national newspapers, magazines of every sort, handbills, the mail, the Internet, promotional merchandise, in-store signs above a child's eye level, and signs in stores closed to minors. The tobacco companies may, moreover, place as many signs as they want in areas more than three blocks from a school or playground, which in most cities would include the concentrated commercial and industrial areas where adults typically work; the regulations impose "no limitations on the number, size, text, or images of the placards" within those

---

sold. The Court previously has upheld cities' authority to make precisely that accommodation. *See Metromedia*, 453 U.S. at 511-12. Oakland and Chicago have, however, restricted alcohol billboard advertising near homes, as well as schools and other youth facilities, because, in Oakland and Chicago, pervasive alcohol billboard advertising accosted minors, not only where they played and attended school, but also where they lived. The need for such fine tuning to each locality's circumstances is precisely why this Court has recognized "room for the exercise of legislative judgment" in its commercial speech cases. *44 Liquormart*, 517 U.S. at 508 (plurality).

permissible zones. *Hill v. Colorado*, 120 S. Ct. 2480, 2495 (2000). When considered cumulatively, these alternative channels leave little risk that Massachusetts adults will suddenly cease to hear the tobacco companies' message.[7]

Massachusetts has not deprived adults of commercial information regarding tobacco products, but simply made it more difficult for tobacco merchants to market their product in a way that induces minors to buy it. This Court has in the past upheld a total ban on offsite commercial billboard advertising, *see Metromedia*, 453 U.S. at 508-12, suggesting that such signs generally are not an indispensable medium for commercial speech.[8] Here, the reasons for restricting the commercial speech are far more compelling, and more than sufficient to justify the regulations' incidental burden on commercial advertising to adults.[9]

3. Massachusetts' restriction on tobacco advertising within three blocks of schools and playgrounds have an obvious and close fit to the state's compelling goal of

---

[7] Published advertising rates for Massachusetts' principal newspaper suggest that newspaper ads are quite inexpensive. As of March 5, 2001, The Boston Globe quoted a price of $158.78 per column inch for a retail display ad run on a Saturday reaching hundreds of thousands of individuals. *See* <http://extranotes.globe.com/rates.nsf/a0f09e7d920?860-d852565a100522a15/4b680f4aac07c31a85256548006457397 Open Document> (visited March 5, 2001).

[8] Other than a narrow circumstance in which sign advertising historically has played a particularly critical role, *see, e.g., Linmark*, 431 U.S. at 93 (real estate "for sale" signs), this Court has never invalidated a restriction on commercial sign advertising. *See, e.g., Metromedia*, 453 U.S. at 507-512; *Packer Corp.*, 285 U.S. 105 (1932). The regulation overturned in *City of Ladue v. Gilleo*, 512 U.S. 43, 45-46, 58 n. 17 (1994), prohibited *political* speech on yard and window signs placed at one's own home.

[9] To the extent that the Master Settlement Agreement imposes certain limits on advertising by signatories to that agreement, those are limits to which they voluntarily agreed, and which they therefore cannot use as a basis to attack Massachusetts' regulations.

preventing illegal tobacco sales to minors. The steady drum beat of such sign advertising is heard by children not just once, but every day. So long as school is in session, tobacco placards placed just outside the schoolhouse gates will persuade and invite children to buy tobacco just as surely as if the signs were placed inside the school yard. When the advertised product is tobacco (or in the case of Oakland and Chicago, alcohol), and when the viewers are children, the signs have the effect of urging a crime.

There is no obvious alternative—petitioners certainly have suggested none—better fitted to preventing illegal tobacco solicitations of minors than restrictions on tobacco advertising where minors spend most of their time. Requiring such signs to carry a warning to minors obviously would be no help, for the point is not that minors should be permitted to avert their eyes to avoid offense. *Compare Cohen v. California*, 403 U.S. 15, 21 (1971). Children are vulnerable, susceptible, and not yet fully rational; they cannot be expected voluntarily to turn away from an attractive nuisance or an enticement to participate in a crime.[10]

The 1000-foot advertising-restricted zone also is, at the very least, a permissible "rough approximation," *Greater New Orleans*, 527 U.S. at 194-95, of the area in which children will be most likely to be solicited by tobacco advertisements on their way to and from school and play. Large signs may be read by a child with average vision at 1000 feet, *see* 61 Fed. Reg. 44504 (Aug. 28, 1996), and although the tobacco industry Master Settlement Agreement limits the size of advertising signs on behalf of the

---

[10] Petitioners note that the Master Settlement Agreement restricts the use of cartoon characters in certain tobacco ads [Pet. Br. 36, No. 00-596], but this restriction plainly is inadequate to address the problem targeted by Massachusetts' regulations. Tobacco advertising signs seen by children every day on their way to school and play induce them to buy tobacco whether or not the signs contain cartoon characters.

signatories, it does not limit the activities of non-signatories. There is, moreover, an "accumulated, common-sense judgment[] of local lawmakers," *see Metromedia*, 453 U.S. at 509, that 1000 feet is an appropriate separation distance from schools and parks to protect children from adult-oriented expression. *Cf. City of Renton*, 475 U.S. at 46. That judgment is born out by experience: When the Oakland City Council held hearings on the appropriate scope for any restrictions on tobacco and alcohol sign advertising, it received testimony from students, teachers, and parents that a pre-existing 500-foot tobacco and alcohol advertising-free zone had proven insufficient to prevent children from being bombarded by such ads on their way to and from school.

Of course, any precise distance is necessarily arbitrary; but "whether or not the [regulatory distance] is the best possible accommodation of the competing interests at stake, we must accord a measure of deference to the judgment of the [state's] Legislature." *Hill*, 120 S. Ct. at 2495. A legislature required to prove whether the "best possible" distance was 900 or 1000 or 1100 feet would be utterly paralyzed, and when it comes to commercial advertisements related to illegal activity, the First Amendment certainly imposes no such exacting requirement. As Justice Stevens recently stated, "Our commercial speech cases recognize some room for the exercise of legislative judgment." 44 *Liquormart*, 517 U.S. at 508 (plurality). Massachusetts has exercised that judgment soundly in this case.[11]

---

[11] Petitioners point out that not all of Massachusetts' evidence was undisputed. In the context of commercial speech, however, undisputed evidence has never been necessary to carry the government's burden of proof. As Justice Scalia noted for the Court in *Fox*, it is precisely because of the "difficulty of establishing with precision the point at which restrictions become more extensive than their objective requires" that the Court has required only a reasonable, not a perfect, "fit." 492 U.S. at 481. Even in the noncommercial speech, time, place and manner context, "the question is whether the legislative conclusion was reasonable and

4. Petitioners' suggestion [Pet. Br. 36, No. 00-596] that the affected tobacco advertising does not "relate to illegal activity" unless the advertisers specifically intended to induce illegal transactions misunderstands the reasons why such advertising can be proscribed. Commercial speech advertising illegal products may be prohibited because it encourages criminal transactions. Advertisements for illegal products can have this effect regardless of their intent. Indeed, as Massachusetts' evidence shows, tobacco advertising's impact on minors is now well documented, regardless of intent. And it is the advertisement's effect, not its intent, that justifies prophylactic regulation. Massachusetts may properly regulate to ameliorate this impact, regardless of the intent of those who advertise tobacco products.

"All advertisement is at least implicitly a plea for its audience's custom." *Zauderer*, 471 U.S. at 639. Advertisers carefully study the demographics of the audience likely to view their ads, and are certainly aware that signs near schools are likely to be seen by minors. Such signs frequently include pictures of young, sexy, or "cool" personages that convey a message even "those too young to read" can understand. *Pacifica*, 438 U.S. at 749; *see infra*, at 1a-3a (illustrative

---

supported by substantial evidence." *Turner Broadcasting Sys. v. Federal Communications Comm'n*, 520 U.S. 180, 211 (1997); *compare Nixon*, 528 U.S. at 395 (mere conflict among studies provides "little reason to doubt" the legislature's conclusion that "large contributions will work actual corruption"). If the government presents substantial evidence to support the restriction of commercial speech, judges "are not to 're-weigh the evidence *de novo*, or to replace [the legislatures'] factual predictions with [their] own.' " *Turner Broadcasting*, 520 U.S. at 211 (citation omitted); *cf. Fox*, 492 U.S. at 478. As Chief Justice Burger said in a different First Amendment context, "when [the courts] face a complex problem with many hard questions and few easy answers [judges] do well to pay careful attention to how the other branches of Government have addressed the same problem." *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 103 (1973).

alcohol billboards that appeared near Oakland homes, schools, and youth centers depicting scantily clad women and attractive young men who may or may not be of legal age); *see also infra*, at 5a. If these are not circumstances that make it "likely" the ads may influence minors to purchase tobacco, one can scarcely imagine what circumstances are.[12]

The government need not prove that an attractive tobacco ad facing into a playground is *intended* to sway the children at play. Where advertisements, because of their location, present a "circumstance[] likely to pose dangers that the State has a right to prevent," the state is not powerless to do so. *Ohralik*, 436 U.S. at 449. Commercial speech may promote illegal transactions in ways that are not "overt"; that does not disable the state from regulating such speech to prevent inducements to crime. *Cf., Pittsburgh Press*, 413 U.S. at 388.

That said, it is by now a matter of public record that tobacco companies have targeted advertising toward unlawful teenage purchasers. *See, e.g.*, C. Perry, *The Tobacco Industry and Underage Youth Smoking: Tobacco Industry Documents from the Minnesota Litigation*, 153 Archives Pediatric Med. 935, 936, 938 (Sept. 1999); Levy, *RJR Memo Targeted Teen Market*, USA Today, at ID (Oct. 6, 1995). Indeed, Liggett & Meyers explicitly admitted in a recent settlement that "the tobacco industry markets to 'youth, which means those under 18 years of age." *See* Attorneys General Settlement Agreement § 4.1 (March 20, 1997) <http://www.stic.neu.edu/

---

[12] *Amicus* Infinity Outdoor, one of the nation's largest outdoor advertising companies, testified at deposition in *Eller Media* that colleges would be the best spot to geographically "target" a population aged 18 to 21—an admission that gives particular significance to a 1996 advertising proposal, produced to Oakland by Infinity in discovery, that lists about 20 sites, all of which are colleges or universities, as "target[s]" for Southern Comfort liquor ads in the Los Angeles area. The same advertising proposal also listed the number of persons "18+" for each site, even though persons aged 18 to 21 are not legal drinkers.

-LIGGETTSETTLE.htm> (visited March 5, 2001). Similar evidence, discovered in the *Eller Media* litigation, indicates that alcohol advertisers have done the same.[13] The state must be permitted sufficient leeway to prevent such illicit targeting.[14]

5. Nor will permitting Massachusetts some room to restrict commercial tobacco advertisements within three blocks of schools and playgrounds leave the flood gates open to advertising restrictions on a broad array of other products that may not be appropriate for minors. *Compare* ANA Br. 19-20. Any restriction on commercial speech for a product illegal to minors but not adults must have a "reasonable fit" to preventing a serious problem of illegal sales to minors. To meet that test, the regulation must leave open sufficient means for lawful, adult consumers to learn about the product and must be justified by the need to prevent a demonstrably

---

[13] Evidence in *Eller Media* included statements by Anheuser-Busch, for example, crowing over the success of a billboard ad campaign that depicted Budweiser "spokespooch" Spuds MacKenzie, whom the company describes as a "party animal par excellence," on a *skateboard*; in the same litigation, *amicus* Infinity Outdoor admitted that if a billboard ad depicted skateboarding, it "would seem to suggest they're targeting kids rather than adults." Similarly, a document produced by Eller Media Co. identified the "target" for a national Bartles & Jaymes wine cooler ad campaign as "Adults 18-49"—even though the legal drinking age is 21. Another document, an industry study on the effects of "Budweiser/Bud Dry Beer Awareness" and "Captain Morgan Spiced Rum Awareness," listed persons aged 18-24 as a "target." *See also* note 12, *supra*.

[14] It would be crippling were a state or municipality required to conduct discovery in each instance to determine the intent of such advertisements. In all likelihood, only the ad man will ever know for certain what he had in mind when he placed an attractive tobacco placard facing into a playground. If the government were required to prove, not only solicitation in circumstances likely to induce illegal transactions, but also a specific intent to make such a solicitation, the government's ability to prevent inducement to illegal commerce would be "substantially diminished." *Ohralik*, 436 U.S. at 466.

real underlying problem. *See Edenfield*, 507 U.S. at 770-71; *see supra*, at 14-15.

The evidence of widespread harm from underage tobacco and alcohol purchase and use is overwhelming. As this Court noted last Term, tobacco addiction is "one of the most troubling public health problems facing our Nation today." *Brown & Williamson Tobacco*, 529 U.S. at 125. The Food and Drug Administration has found that most of the 400,000 smokers who die each year began smoking regularly when they were minors. *Id.* at 127-28. Illegal youth drinking is similarly epidemic—almost half of children have been *drunk* before 10th grade, *see* Public Health Service, U.S. Dep't of Health & Human Servs., 1 "Drug Use Among American High School Seniors, College Students and Young Adults, 1975-1990," at 91 (1991)—and at least as dangerous: The record in *Eller Media*, for example, established that more than half of students at one high school reported either driving while drunk or riding with a drunk driver. The record also implicated illegal youth drinking in rapes, homicide, traffic accidents, assaults on police officers, and rioting.[15] On such facts, the reasons for restricting tobacco and alcohol advertising to children outside schools and playgrounds are far stronger than those this Court found sufficient, in *Pacifica Foundation*, to support restrictions on the broadcast of seven "filthy words."

The same cannot be said for virtually any of the other products that *amicus* ANA fears the government will suddenly decide to regulate. There is no crisis of twelve year olds illegally buying cars, renting hotel rooms, enrolling for telephone services, purchasing pesticides, employing escort

---

[15] Oakland's youth drinking problem had also resisted a lengthy, multi-prong campaign of enforcement, education and regulation pursued by Oakland before it finally adopted complementary restrictions on the locations of alcohol advertising. *See infra*, at 16a-19a.

services, trading in securities, or—of all unlikely things suggested by *amicus*—misacquiring public transportation tickets. Nor do any of these products have either the addictive qualities of tobacco and alcohol that make minors' use particularly dangerous, or a similar history of tacit marketing to minors. Indeed many of the products cited by *amicus* may quite lawfully be given or sold to minors. If the state were suddenly to restrict advertising for these other products it would need to demonstrate that its regulations had a "reasonable fit," *Fox*, 492 U.S. at 480, to the redress of a serious problem. In this regard, tobacco and alcohol stand in a class by themselves. If any of the other products about which *amicus* ANA expresses concern should in fact become associated with societal problems of the dimensions of unlawful underage tobacco and alcohol sales, restrictions on their commercial promotion would, and should, begin to assume a quite different constitutional complexion.

For this reason, ANA's parade of horribles does not establish that upholding the constitutionality of Massachusetts' regulations would pose a credible hazard of a slippery slope. It plainly makes both constitutional and common sense for the government to be able to restrict ads, near the schoolyard and playground, for a product that is illegal to sell to children, a product the widespread underage use of which has not only dangerous, but often deadly, consequences. As Justice Stevens has written, "[a] picture which may appropriately be included in an instruction book may be excluded from a billboard." *Carey*, 431 U.S. at 717 (Stevens, J., concurring). This case proves that point.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

JOHN A. RUSSO,
City Attorney
BARBARA J. PARKER
MARK P. WALD
One Frank H. Ogawa Plaza,
Oakland, CA 94612

MARA S. GEORGES,
Corporation Counsel
LAWRENCE ROSENTHAL
BENNA RUTH SOLOMON
City Hall, Room 600
Chicago, IL 60602

March 2001

STEPHEN P. BERZON *
MICHAEL E. WALL
ALTSHULER, BERZON, ET AL
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151

ROBERT C. POST
School of Law (Boalt Hall)
University of California
Berkeley , CA 94720

* *Counsel of Record*